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No. 11 Orig.

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN EQUITY

OCTOBER TERM, 1930.

THE STATE OF WASHINGTON,
Complainant,

v.

THE STATE OF OREGON,
Defendant.

REPLY OF COMPLAINANT TO ANSWER OF DEFENDANT

JOHN H. DUNBAR,
Attorney General,

JOHN C. HURSPOOL,
Assistant Attorney General,

FRED J. CUNNINGHAM,
Attorneys for Complainant,
State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Washington.

JAY THOMAS, PUBLIC PRINTER, OLYMPIA

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Comes now the complainant in said cause by John H. Dunbar, its attorney general and duly authorized counsel for said complainant, and by leave of court first had and obtained, hereby replies to affirmative matter contained in the answer of the defendant in said cause filed herein, as follows, to-wit:

The complainant admits the allegation of defendant on page 4 of its answer, that during the summer, or irrigation season of the year, no water

is discharged into the Walla Walla river from the east or the west branches of the Crockett or from the Ford branch so far as the present time is concerned and alleges that by means of dams and other controlling works, water has been in recent years diverted in the state of Oregon from the main stream into the Little Walla Walla river and into the various branches thereof and into other drainage channels and into irrigation ditches in that locality and the water of said main stream has thus been prevented from returning to the main channel of said Walla Walla river in the state of Washington at a point thereon above the principal diversions of said Walla Walla river in the state of Washington for the use of prior rights in said state of Washington, and the lands irrigated therefrom have been deprived of the use of said water.

Concerning the matters and things alleged in the last paragraph on page 8 and ending on page 9 of the answer of defendant, this complainant denies that about 700 acres or any greater number than approximately 70 acres of lands which required irrigation had been irrigated in the state of Oregon prior to 1870 and alleges that complainant has no knowledge or information as to appropriations in said state for power purposes, but alleges that waters if any appropriated for power purposes were all returned to the said Walla Walla river and its branches and flowed into the state of Washington undiminished in quantity by reason of such use.

Replying to the allegation on page 9 of the defendant's answer that in 1892 fully 5831 acres of land were irrigated in Umatilla county, Oregon, from the waters of said Walla Walla river and its tributaries, the complainant denies the same and denies that any number of acres were irrigated in said county from said stream in said year in excess of 1200 acres.

The complainant denies that 3024 acres of lands, or any other number of acres of lands, along the Walla Walla river, the east and west branches of the Little Walla Walla, along Mud and Pine creek are principally sub-irrigated from the waters of said streams, as alleged on page 10 of defendant's answer.

Replying to defendant's allegation on pages 10 and 11 of defendant's answer that a pipe line was constructed for a distance of about four and one-half miles from the city of Walla Walla for the carriage of sewage waters, said complainant admits that such pipe line was constructed, but denies that 16 cubic feet per second or any greater quantity than 5 cubic feet per second of sewage water was ever carried in said pipe line and alleges that said pipe line has been discontinued because unpractical.

The complainant denies that the state of Washington, its municipal corporations and people have increased from year to year without regard to the rights of former irrigators their irrigated acreage, and have unreasonably and excessively increased the amount of water taken from said stream and its trib-

utaries, and have caused and are causing the loss and injury to the irrigators in the Walla Walla county, as alleged on pages 14 and 15 of the defendant's answer.

For reply to the allegation on page 15 of defendant's answer, complainant denies that that part of Walla Walla county in which Mill creek, Yellow Hawk, Garrison and Titus creeks, Cottonwood, Blue and Reser creeks, Russel, Pine, Mud and Little Mud, Doan and Stone creeks lie is in the same watershed as the Walla Walla river, the Tum-a-lum river and the tributaries of the said Walla Walla river and the Tum-a-lum river in the state of Oregon and alleges that each of said streams is not in the same watershed as the Walla Walla river nor in the same watershed with respect to each other, and that they all empty into the said Walla Walla river in the state of Washington at points north of the north boundary of the state of Oregon, and none of the waters thereof are available for use in the state of Oregon.

Complainant denies that the water appropriated by the city of Walla Walla is conveyed away from the said Mill creek and not permitted to flow into the Walla Walla river with the other waters thereof, but consumed by said city for municipal purposes as alleged on page 16 of defendant's answer, and alleges that the residue thereof after use by the city is returned to said Mill creek and that none of such water could be used in the state of Oregon.

Complainant denies that there has been appropriated and used since the year 1919 in Walla Walla County, Washington, up to the end of the year 1926, water from the streams hereinbefore named for the irrigation of 3490.76 acres placed under irrigation since 1919 in said county and state, as alleged on page 16 of defendant's answer, but admits that a lesser number of acres, the exact amount of which is unknown to the complainant, has been placed under irrigation since 1919, and complainant alleges that the larger portion of such lands were not irrigated from said Walla Walla river or its tributaries in the state of Oregon or from waters which could be used in the state of Oregon; that the irrigation of such lands as were irrigated from said Walla Walla river or its tributaries in the state of Oregon at no time interfered with the irrigation of lands in the state of Oregon.

Concerning the allegation on page 16 of defendant's answer that during said period of time (1919 to 1926) only 1573.98 acres of land have been placed under irrigation from the said Walla Walla river and its tributaries in the state of Oregon, the complainant has not sufficient information or knowledge to form a belief, and therefore denies the same.

Complainant denies that the supervisor of hydraulics of the state of Washington has established an excessive duty of water for use upon said lands in the state of Washington, as alleged on page 16 of defendant's answer; complainant also denies that

said supervisor has permitted and allowed the appropriators and users of water between said year 1919 and the latter part of the year 1926 to use from October 1 to April 1 of each year one cubic foot of water per second to 50 acres of land so irrigated, as alleged on pages 16 and 17 of defendant's answer, the complainant alleges that the period prescribed by said supervisor for the use of one cubic foot of water per second to each 50 acres of land is from October 1 in one year to April 1 of the next, the period of the winter and spring run-off in the streams involved. Said complainant further alleges that rights with priorities of 1919 and later years have been used only after rights of earlier priorities have been satisfied from the streams involved.

For reply to the allegation on pages 17 and 18 of defendant's answer that in the state of Washington during said year (1926) there were 25,269 acres under irrigation and water had been alloted to each acre thereof; that 23,271 acres were farmed and irrigated while 2,018 acres were under existing ditches in various stages of development, the complainant alleges that of said lands irrigated in the year 1926 only 6,000 acres approximately received water during the summer irrigation season; that the balance of said irrigated lands having rights of late priorities relatively received water only intermittently during the winter and spring run-off in the streams involved when a supply of water was available for their use or partial use. Replying to the allegations of defend-

ant on page 18 as to the number of acres of land irrigated in Walla Walla county from the Walla Walla river and its tributaries, complainant alleges that of the lands so alleged to be irrigated in said Walla Walla county, Washington, not to exceed 11,000 acres are irrigated from the Walla Walla river or its tributaries from which waters are or can be taken for irrigation in the state of Oregon, and of those so irrigated a considerable portion were irrigated solely during the ordinary non-irrigating season, when the waters would otherwise flow to waste; that concerning the allegation on page 18 of defendant's answer that during said year of 1926 the state of Oregon had but 18,269 acres under irrigation from said stream and its tributaries, all of which had been appropriated, diverted and used as hereinbefore alleged, the complainant has not sufficient knowledge or information to form a belief and therefore denies the same.

Replying to the allegations of said answer in the second paragraph on page 18 continuing to page 19, complainant denies that any of the water involved in this suit is permitted to run to waste and alleges that complainant has no exact information as to the amount of water flowing in the Walla Walla river at or below the mouth of the Touchet river, but alleges that such water is all return and seepage water from said Walla Walla river, Mud creek, Pine creek and the Touchet, which had been put to a beneficial use and that no part of such waters can be used for

irrigation of lands in the state of Oregon or of any lands in the state of Washington by any feasible means.

The complainant admits that amounts of water diverted from the Walla Walla river and from the Tum-a-lum river for power and irrigation purposes have been discharged into the Little Walla Walla river, as alleged on page 24 of defendant's answer but complainant denies that said waters flowed and still continue to flow away from said main stream in such northwesterly direction from a point just below the forks of the Tum-a-lum and Walla Walla rivers in the city of Milton, and alleges that such waters have reached, and will reach, unless wrongfully diverted, the main stream of said Walla Walla river above the principal diversions thereon in the state of Washington.

The complainant denies that for about 40 years or more last past said Tum-a-lum river (the local name in the Milton-Freewater district for main channel of the Walla Walla river) has been absolutely dry during the summer and irrigation season of each year from a point about four miles above the state line to a point about two miles above the said state line but complainant admits that at short intervals within the last ten years citizens of Oregon have diverted all of the water of the stream at a point just above the Tum-a-lum section of the Walla Walla river, the period of diversion varying according to the season, and complainant alleges that in no

year during the last 40 years or more has the whole supply of water of said section of the Walla Walla river been diverted during the entire summer and irrigation season.

Concerning the allegations on pages 23 and 24 of defendant's answer that the greater part of the rights to the use of the waters of said Walla Walla river and its tributaries were adjudicated and determined more than 20 years ago by the courts of the said state of Oregon and said appropriators whose rights and interests therein were so determined have ever since held and still hold the waters of said streams pursuant to the provisions of said decree and said rights are valuable property rights that have become vested in the individual appropriators and their successors under the constitution and laws of the state of Oregon and of the United States, the complainant has not sufficient knowledge or information to form a belief as to the amount of these rights, their nature or their use for more than 20 years and, therefore, denies the same and each and all of said allegations and said complainant denies that said rights, if any or whatever their nature may be, are vested as against the complainant or its inhabitants, in this action and said complainant denies that the plaintiff's bill of complaint is an attempt to deprive the owners thereof of their property rights or any other rights therein.

For reply to the second paragraph beginning on page 25 of defendant's answer relating to adverse user, complainant denies that said state of Oregon

and its people diverted, appropriated and used in good faith or under claim of right or under color of title or pursuant to the laws of the state of Oregon or the recognized custom of appropriating water from said streams in said territory at said time or applied to beneficial uses from about the year 1864 to 1893 water from said river and its tributaries for the irrigation of 5,831 acres of land or any other number of acres of land and about 4,000 miners' inches measured under a 6 inch pressure or any other number of miners' inches measured under a 6 inch pressure or any other pressure and have ever since held and used said waters for said purposes, and from 1892 to 1909, 6,712.73 or any other number of acres and from 1908 to 1921, 3,042.82 or any other number of acres and from 1920 to 1927, 1,573.98 or any other number of acres. Complainant denies that said appropriators have taken, used, held and carried away the said waters of said stream openly or notoriously or adversely to the state of Washington or to its citizens or to all the world since said dates in said answer alleged or since any other dates.

Concerning the matters and things alleged in the second paragraph beginning on page 26 of the defendant's answer, the complainant has not sufficient knowledge or information to form a belief and, therefore, denies the same and every matter, allegation and thing in said paragraph contained, and the complainant specifically denies that during the times alleged in the defendant's answer neither the state of

Washington nor its people have ever protested against the diversion, appropriation or use of the waters of said streams for the purposes enumerated in the defendant's answer and said complainant specifically denies that by reason of the acts or conduct or doings of the said state of Washington or its agents or servants or people or corporations or by any other reason it or they are or ought to be estopped from claiming or asserting that the state of Oregon or its people are or have been damaging them or any of them or estopped from asserting or claiming any right or interest in or to the waters of said streams so appropriated or used and denies that it or they ought to be estopped from interfering with the said appropriations or diversions from said streams or any of them.

WHEREFORE, the complainant having made full reply to the answer of the defendant herein prays for judgment as prayed for in its original bill of complaint on file in said cause.

JOHN H. DUNBAR,
Attorney General,

JOHN C. HURSPOOL,
Assistant Attorney General,

FRED J. CUNNINGHAM,
Attorneys for Complainant,
State of Washington.

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PROOF OF MAILING REPLY.

STATE OF WASHINGTON } ss.
County of Thurston

The undersigned being first duly sworn on oath deposes and says that on the..... day of....., 1932 at Olympia, Washington, he deposited in the United States Postoffice in sealed envelopes, one addressed to "Mr. Isaac H. Van Winkle, Attorney General, Salem, Oregon," one addressed to each "Mr. James A. Fee and Mr. Charles Z. Randall, Pendleton, Oregon," and one addressed to "Mr. George T. Coch-

ran, LaGrande, Oregon," true copies of the Reply of Complainant to Answer of Defendant in the above entitled cause.

.....

Subscribed and sworn to before me this.....

day of....., 1932.

.....

Notary Public, residing at

....., Washington.

My commission expires.....